In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 628

DANIEL JAY SCHACHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-30) is reported at 414 F. 2d 630.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1969. No extension of time within which to file a petition for a writ of certiorari was either requested or obtained. The instant petition, filed on

September 22, 1969, is thus substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

18 U.S.C. 702 provides:

> Whoever, in any place within the jurisdiction of the United States or in the Canal Zone, without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States, Public Health Service or any auxiliary of such, shall be fined not more than $250 or imprisoned not more than six months, or both.

10 U.S.C. 772(f) provides:

> While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.

QUESTION PRESENTED

Whether petitioner was constitutionally convicted of violating 18 U.S.C. 702—which proscribes the wearing of distinctive portions of a military uniform by a civilian—where he was so attired at a street demonstration protesting the Vietnam conflict, during which he performed a brief skit which, he contends, fell within the exception provided in 10 U.S.C. 772(f).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of the unauthorized wearing of distinctive parts of an Armed Forces uniform, in violation of 18 U.S.C. 702. On February 29, 1968, he was sentenced to imprisonment for six months and fined $250. The court of appeals affirmed.

1. The evidence showed that on the morning of December 4, 1967, a group of persons gathered in front of the Selective Service induction station in Houston, Texas, to protest against the Vietnam conflict (R. 120-121).[1] During the course of this demonstration, which lasted from 6:30 to 8:30 a.m., petitioner and co-defendant Jarrett Vander Smith were observed wearing distinctive portions of the uniform of the United States Army. Petitioner wore a blouse of the type currently authorized and issued to Army enlisted men, bearing a shoulder patch designating service in Europe. The buttons on the blouse also were of a distinctive military design. On his head petitioner wore an outmoded military hat. Affixed to the hat in an inverted position was the eagle insignia currently worn on the hats of Army officers (R. 183, 222). Smith was wearing an Army blouse or jacket which had official military buttons. Neither petitioner nor Smith were members of the Armed Forces at the time they wore these items.

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[1] "R." refers to the one-volume "Record on Appeal," which has been filed with the Clerk of this Court.

2. Petitioner admitted wearing these portions of the military uniform. He and other defense witnesses testified that in the course of the demonstration, petitioner and another individual impersonated soldiers in a skit designed to show that the American presence in Vietnam was wrong. In the skit they carried water pistols filled with red ink and chased after a third performer, who was dressed in a black robe and a coolie-type hat. After "shooting" their prey, petitioner and his comrade would walk up to him and pretend to discover that the "victim" was a pregnant woman (R. 265). The three participants had rehearsed their skit prior to the demonstration, and had performed it one or two days before in front of a student club at the University of Houston (R. 275, 317-319). A newspaper reporter covering the demonstration testified that the skit was performed three or four times, each performance lasting no longer than three minutes (R. 265, 269-270). The individual who portrayed the Vietnamese woman claimed that the skit was performed continuously throughout the course of the demonstration (R. 277). Government witnesses who had seen petitioner at the demonstration declined to characterize his conduct as a role in a play; they testified merely that in the course of the demonstration petitioner and the other individuals chased each other in a manner resembling horseplay rather than play-acting (R. 122, 130, 162-163, 181-182).

3. In the closing charge to the jury the court read verbatim the language of 10 U.S.C. 772(f) and defined the words "portrayal", "theatrical", and "dis-

credit" (R. 409-412). The jury was told that it must acquit petitioner if it found that he wore parts of the military uniform while performing a theatrical production which did not tend to discredit the Armed Forces (R. 412).

ARGUMENT

As noted, the petition for a writ of certiorari is out of time by some 100 days.[2] In any event, it presents no issue warranting further review.

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[2] Petitioner has filed with the Court a motion for leave to file an untimely petition, in which he seeks to explain that the delay was not his fault. Petitioner alleges that following conviction he consulted the local chapter of the American Civil Liberties Union, which agreed to handle his case on appeal although he was not indigent. The A.C.L.U. referred him to Mr. Gray, who represented him without cost throughout the course of his appeal in the Fifth Circuit, and filed a motion to stay the mandate following affirmance. This attorney, however, refused to bear the expense of perfecting an application for review by this Court. Petitioner alleges that Mr. Gray never informed him of the failure of the A.C.L.U. to provide the necessary funds for filing a petition for a writ of certiorari; that he was in fact ignorant of the deadline for filing a timely petition; that he relied completely upon counsel to protect his appellate rights; and that he did not learn of the failure to provide this protection until August 29, 1969, when he received an order from the United States Marshal to surrender himself. At a hearing in the district court on September 2, 1969, testimony was received from petitioner, Mr. Gray and his associate, and from a representative of the A.C.L.U. The court then denied release on bail and ordered petitioner to commence service of his sentence. The transcript of this hearing has been filed with the Clerk of this Court. Following the filing of the petition for a writ of certiorari, the district court, on October 7, 1969, admitted petitioner to bail in the amount of $2,000.

1. Petitioner's principal challenge is not actually directed at the statute underlying his conviction—18 U.S.C. 702—at least insofar as it proscribes the wearing of the uniform by a person not a member of the Armed Forces in situations other than a theatrical production. He acknowledges that he was not a member of the Army when he wore the military regalia at the demonstration. He claims, however, that he was entitled to wear those items because he was portraying a member of the Armed Forces in a theatrical production, within the meaning of 10 U.S.C. 772 (f), and that, insofar as that statute authorizes the wearing of the military uniform only in those productions which do not "tend to discredit that armed force," it violates freedom of expression as protected by the First Amendment and due process as guaranteed by the Fifth Amendment. The thrust of petitioner's argument, therefore, is primarily directed against that specific clause in the statute, which he contends to be unconstitutional.

Whatever merit this contention might have, the instant case does not present an appropriate situation in which to consider it, since petitioner's conduct failed to fall within Section 772(f) at all. This is made abundantly clear by an examination of that provision and its legislative history. The source of 10 U.S.C. 772(f) is Section 125 of the National Defense Act of 1916 (39 Stat. 166, 216-217), which read in pertinent part:

> It shall be unlawful for any person not an officer or enlisted man of the United States Army * * * to wear the duly prescribed uniform of the

> United States Army * * * or any distinctive part of such uniform, or a uniform any part of which is similar to a distinctive part of the duly prescribed uniform of the United States Army * * *: *Provided*, That the foregoing provision shall not be construed so as * * * to prevent any person from wearing the uniform of the United States Army * * * in any playhouse or theater or in moving-picture films while actually engaged in representing therein a military * * * character not tending to bring discredit or reproach upon the United States Army * * *.

The wording of Section 125 was not altered until 1956, when Titles 10 and 32 of the United States Code underwent a complete revision for the purpose of combining all of the laws affecting the Armed Forces in one section of the United States Code, eliminating duplicate statutes and obsolete verbiage, and clarifying certain statutory language. The sponsors emphasized, however, that no changes of substance had been intended by the revision.[8] In the revised code, the proviso portion of Section 125 was reworded and became 10 U.S.C. 772(f). The sole purpose of the restatement was to remove the negative character of the provision and thus "to make positive the authority of the persons described * * * to wear the uniform prescribed for the appropriate organization or activity." H. Rep. 970, 84th Cong., 1st Sess., pp. 52-

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[8] See the testimony of Dr. F. Reed Dickerson, Office of the General Counsel of the Department of Defense, Hearing before a Subcommitte of the Senate Committee on the Judiciary on H. R. 7049, 84th Cong., 2d Sess., pp. 15-16; Statements of Senators O'Mahoney and Wiley, 102 Cong. Rec. 13944, 13953 (July 28, 1956); and H. Rep. 970, 84th Cong., 1st Sess., p. 8.

53. The "theatrical production" exception was not extended to include conduct such as that engaged in by petitioner, but continued to be limited to performances in playhouses, theaters, or motion pictures—a logical exemption for situations where the audience is completely and unequivocally aware that the individuals portraying military figures are merely *actors*, and not what they appear to be.

By allowing the jury to consider the effect of 10 U.S.C. 772(f) on the question of guilt, the trial judge extended to petitioner an unnecessary gratuity. The jury nevertheless convicted petitioner of violating 18 U.S.C. 702, and the evidence amply supports that finding. In these circumstances, there is no occasion for review of an argument having no foundation in the evidence adduced at trial.

2. Petitioner also attacks the validity of Section 702 on constitutional grounds. As to this challenge, we rely on the majority and concurring opinions in the court below for the proposition that Congress can lawfully prohibit *conduct* which conveys ideas so long as a valid governmental interest is thereby served (see Pet. App. 19-25, 27-30). *E.g.*, *United States* v. *O'Brien*, 391 U.S. 367.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1969.

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